

herein as the ESN Orders.) A copy of the Second ESN Order is attached to the Complaint as Exhibit "C."

In response to an FCC Notice of Proposed Rule Making, released June 12, 1992, 7 F.C.C. Rcd. 3658, and published in the Federal Register July 1, 1992 (57 Fed. Reg. 29260), C2+ Technology, a company that altered ESNs, requested the FCC to amend the Commission's rules and allow companies to market ancillary cellular equipment that emulates ESNs for the purpose of allowing more than one cellular telephone to have the same telephone number. See paragraph 67 of the second ESN Order, Exhibit "C" to the Complaint.

The FCC specifically rejected the proposed amendment of the emulator. The Commission wrote:

"Further, we conclude that the practice of altering cellular phones to "emulate" ESNs without receiving the permission of the relevant cellular licensee should not be allowed because (1) simultaneous use of cellular telephones fraudulently emitting the same ESN without the licensee's permission could cause problems in some cellular systems such as erroneous tracking or billing; (2) fraudulent use of such phones without the licensee's permission could deprive cellular carriers of monthly per telephone revenues to which they are entitled; and (3) such altered phones not authorized by the carrier, would therefore not fall within the licensee's blanket license, and thus would be unlicensed transmitters in violation of Section 303 of the Act."

See paragraph 60 of the Second ESN Order, Exhibit "C" of the complaint.

The Commission further concluded:

"Nevertheless, with regard to existing equipment, we conclude that cellular telephones with altered ESNs do not comply with the cellular system compatibility specification¹ and thus may not be considered authorized equipment under the original type acceptance. Accordingly, a consumer's knowing use of such altered equipment would violate our rules. We further believe that any individual or company that knowingly alters cellular telephones to cause them to transmit an ESN other than the one originally installed by the manufacturer is aiding in the violation of our rules. Thus, we advise all cellular licensees and subscribers that the use of the C2+ altered cellular telephones constitutes a violation of the Act and our rules."

See paragraph 62 (emphasis added).

In conclusion, in its Second ESN Order, the FCC clearly stated (1) use of altered cellular telephones constitutes a violation of both the Communications Act of 1934, as amended, and the First ESN Order as codified in Commission rules, and (2) any company that knowingly alters cellular telephones is "aiding in the violation of our [FCC] rules."

Request For Temporary Restraining Order

Pursuant to 47 U.S.C. §401(b) and Rule 65(b) of the Federal Rules of Civil Procedure, NYNEX Mobile is entitled to a temporary restraining order from the court (1) enjoining defendant from altering, transferring, emulating or manipulating the ESNs of

¹ See previous 47 CFR §22.915, which became new 47 CFR §22.933, adopted in the Second ESN Order.

cellular telephones and (2) requiring that all records, computer disks, and other information concerning altered telephones be preserved in their current state. As shown by the complaint affidavits and evidence attached hereto and incorporated herein, NYNEX Mobile would show immediate and irreparable injury will occur to NYNEX Mobile if an order enjoining defendant from altering, transferring, emulating or manipulating the ESNs is not granted. Specifically, as shown by the affidavit of Gary Sutcliffe, Project Manager - Technology of NYNEX Mobile, NYNEX Mobile would show that it has no way of monitoring altered telephones and will continue to suffer fraudulent and unauthorized use of air time and theft of air time unless this order is granted. Furthermore, without records from defendant indicating the names of customers who have received altered telephones NYNEX Mobile does not have a way to monitor the unauthorized use of cellular telephones or notify specific customers that they are using cellular telephones in an unauthorized manner. NYNEX Mobile would show that it has no way of monitoring altered telephones and will continue to suffer fraudulent and unauthorized use of air time and theft of air time unless this order is granted. Furthermore, without records from defendants indicating the names of customers who have received altered telephones, NYNEX Mobile does not have a way to monitor the unauthorized use of cellular telephones or notify specific customers that they are using cellular telephones in an unauthorized manner.

In addition, 47 U.S.C. §401(b) states:

"(b) If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order. If, after hearing, that court determines that the order was regularly made and duly served, and that the person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same."

In South Central Bell Telephone Company v. Louisiana Public Service Commission, 744 F.2d 1107 (5th Cir. 1984) vacated on other grounds 106 S.Ct. 2284, the Fifth Circuit, interpreting §401(b), stated:

"Under §401(b), a party seeking enforcement of an FCC declaration may obtain an injunction upon a finding that (1) the declaration is an FCC "order" within the meaning of the Act, (2) the order was regularly made and duly served upon the defendant, (3) the defendant is in disobedience of the order, and (4) the party seeking the injunction has been injured by the defendant's disobedience."

Id. at 1114-1115.

An FCC declaration is an "order," if the "agency acts in accordance with its legislatively delegating rule making authority" and intends it to be binding on all applicable persons. Id. at 1115. On their face, the ESN Orders are "orders" prohibiting individuals, inter alia, from using cellular

phones with altered ESNs or from altering ESNs in cellular phones.

In order to show that an order was duly served, the Fifth Circuit has stated:

"Thus, the requirement of "due service" is met if the defendant in a §401(b) proceeding received notice legally sufficient to make the order enforceable. Under the APA [Administrative Procedures Act], a rule is enforceable once it is published in the Federal Register. 5 U.S.C. §552(a)(1). The Supreme Court has held that appearance of a rule in that publication constitutes legal notice to the general public."

Id. at 1119 (cites omitted). The FCC adopted the ESN Orders pursuant to lawful notice and rule making proceedings under the APA, and the referenced ESN Orders were published in the Federal Register.

NYNEX Mobile, through the affidavits and Exhibits attached hereto and incorporated herein, has shown that the defendants have violated "orders" of the FCC which have been "duly served" upon the defendants. Because NYNEX Mobile has been injured by defendant's disobedience, it is entitled to a temporary restraining order prohibiting the altering, transferring, emulating or manipulating of ESNs of cellular telephones and enjoining defendant from altering or destroying any records relating to the altering, emulating, transferring or manipulating of ESNs.

In early 1995, Houston Cellular Telephone Company brought an action virtually identical to this one against two ESN emulators. The action, Houston Cellular Telephone Company v. John C. Nelson, et al. (Civil Action H-95-617) was brought in the United States District Court for the Southern District of Texas, Houston Division.

22. The Court, by order dated March 15, 1995, granted a permanent injunction (annexed hereto as Exhibit "E") holding as follows:

"B. Conclusions.

1. The FCC orders were regularly made, published in the Federal Register, and served on defendants by publication. 5 U.S.C. §552(a) (1). See also, Fed. Crop Ins. v. Merritt, 332 U.S. 380, 384-85 (1947).
2. These orders adopted by the FCC constitute orders within the meaning of §401(b) (47 U.S.C. §401(b)) of the Communication Act of 1934.
3. Emulation of the electronic serial numbers of cellular telephones by Nelson, Hart, and Action Cellular Extensions, Inc. [defendant emulators] violates the two FCC orders.
4. Section 401(b) of the Communication Act of 1934 expressly authorizes injunctive relief for a party injured by disobedience of an FCC order. The prerequisite of irreparable injury need not be established where such injunctive relief is expressly authorized by statute. United States v. Hayes Int'l Corp., 415 F.2d 1038, 1045 (5th Cir. 1969); Gresham v. Windrush Partners, 730 F.2d 1417, 1423 (11th Cir. 1984). Although Houston Cellular need only demonstrate that it has been injured to satisfy this standard, having found that it was in fact irreparably injured by defendants' acts and in an amount not susceptible

to calculation, the court concludes that injunctive relief is available at common law."

Request For Preliminary And Permanent Injunction

NYNEX Mobile asks the court to set a date, within ten (10) days of the signing of the temporary restraining order, for hearing on the preliminary injunction. At the same time, NYNEX Mobile asks the court to order defendant to produce certain records relating to the altering, transferring, emulating or manipulating of cellular telephones, the servicing of clients, and/or responses to inquiries about such altering, transferring, emulating or manipulating on cellular telephone to the court for in camera inspection and safekeeping. In particular, plaintiff asks for the following records:

1. All lists, files, records or other information containing names, addresses and/or telephone numbers of individuals or entities for whom defendant altered, transferred, emulated or manipulated the electronic serial number of cellular telephones from January 1, 1990 to the present.
2. All advertisements, brochures or other documents which advertised services defendant provide to the public for altering, transferring, emulating or manipulating the electronic serial number of cellular telephones.
3. Documents in defendant's possession which identify other individuals or entities which provide services which alter, transfer, emulate or manipulate the electronic serial numbers of cellular telephones.

4. Documents which evidence any previous or current business relationship or dealings with the entity C2+ Technology.

Furthermore, after the preliminary injunction hearing, NYNEX Mobile asks for a trial at the earliest possible setting in order to permanently enjoin defendant from (1) altering, transferring, emulating or manipulating the ESN on cellular telephones, ~ (2) altering or destroying any record that relates to the altering, transferring, emulating or manipulating of cellular telephones, or the servicing of clients or responses to inquiries about such altering, transferring, emulating or manipulating on cellular telephones.

**Request For Declaratory Relief
Pursuant To 28 U.S.C. 2201 Et Seq.**

Additionally, pursuant to 28 U.S.C. 2201(a), NYNEX Mobile seeks a judgment from this court declaring the rights and obligations of NYNEX Mobile and the defendant. Specifically, NYNEX Mobile asks the court to declare:

- a. Defendant's altering, transferring, emulating or manipulating ESNs is a violation of the FCC's ESN Orders and regulations and aids and assists others in violating the FCC's ESN Orders and regulations.
- b. The use of emulated or altered telephones is a violation of the FCC's ESN Orders and regulations.

- c. NYNEX Mobile has the right and the obligation to determine the names of all customers who have had their cellular telephones altered, transferred, emulated or manipulated so as to advise and notify the customer that the use of altered, transferred, emulated or manipulated telephones is a violation of the FCC's ESN Orders and regulations.
- d. Defendant has no right to alter, transfer, emulate or manipulate cellular telephones of NYNEX Mobile customers.

Plaintiff's request for injunctive relief complies with all the requirements of this court for an injunction:

- a) the summons and complaint annexed hereto demonstrate clearly that defendant violated the ESN Orders;
- b) there is no adequate remedy at law since plaintiff's damages are not calculable; and
- c) there is every likelihood of success on the merits as both the FCC and the courts have held that the alteration of ESN numbers is a violation of law.

No prior application for relief has been made herein.

CONCLUSION

For the foregoing reasons plaintiff respectfully requests that defendant, CELLULAR EMULATION SYSTEMS, INC., be enjoined from altering, transferring, emulating or manipulating the ESNs of cellular telephones and altering or destroying any records, computer disks, and other information that relates to the altering, transferring, emulating or manipulating of cellular telephones or servicing of clients or responses to inquiries about such altering, transferring, emulating or manipulating on cellular telephones.

Dated: New York, New York
 June 5, 1995

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CAROL R. ABRAMSON (CRA-2144)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CIV. PROC. NO.
95 CIV. 4335 (LAP)

- against -

Defendant.

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PRELIMINARY STATEMENT

Plaintiff submits this memorandum of law in further support of NYNEX Mobile's application for a temporary restraining order, a preliminary injunction and ultimately, a permanent injunction barring defendant from violating the FCC's ESN orders and for an order pursuant to 28 U.S.C. §2201(a) declaring that defendant cannot alter, transfer, emulate, or manipulate the ESNs of cellular telephones in violation of the FCC's ESN orders.

I.

47 U.S.C. §401(b) REQUIRES A SHOWING OF INJURY, NOT IRREPARABLE INJURY

While a showing of irreparable injury is required in a traditional suit for injunctive relief, no such showing is required by a party seeking an injunction under the provisions of 47 U.S.C. 401(b). Southwestern Bell Telephone Company v. PUC of Texas, 812 F.Supp. 706 (D. Texas 1993). In Southwestern Bell, Southwestern Bell Telephone Company sought injunctive relief from a ruling of the Public Utility Commission of Texas. The court held at 812 F.Supp. at 710-711:

"1. Degree of Injury Required.

Section 401(b) also requires that a party bringing suit under its provisions be "injured." SWBT [plaintiff] need not, however, prove irreparable injury as required in a traditional suit for injunctive relief. See South Central Bell Tel. Co. v. Louisiana Pub. Serv. Comm'n., 744 F.2d 1107, 1120 (5th Cir. 1984), vacated and remanded on other grounds, 476 U.S. 1166, 106 S.Ct. 2884, 90 L.Ed.2d 972 (1986); Illinois Bell Tel. Co. v. Illinois Commerce Comm'n., 740 F.2d 566, 571 (7th Cir. 1984); Southwestern Bell v. Arkansas PSC, 738 F.2d 901 at 908 n.15. (Emphasis added.)

The court further held that a petitioner need not prove substantial injury either. The plain language of the statute simply says "injured" and that is all plaintiff need prove. 812 F. Supp. at 711.

The United States District Court for the Eastern District of Missouri reached the same result on May 25, 1995. In Southwestern Bell Mobile Systems v. Cell Phone Extensions, No. 4:95-CV-796-CAS (E.D. Mo 1995), the court held that the FCC order at issue here was enforceable under §401(b) without satisfying the traditional prerequisites for injunctive relief. (Appendix "B" hereto at p. 7). Citing Southwestern Bell Telephone, the Missouri Court held that injunctive relief was appropriate if the order at issue (the same FCC ESN Orders at issue here) was regularly made, clearly served, disobeyed and "plaintiffs were thereby injured." (Attached hereto as Appendix B at pp. 7-8).

These Texas and Missouri holdings follow the general rule that if a "preliminary injunction is sought under a statute which expressly authorizes such relief, irreparable injury need not be demonstrated and it is sufficient to show that the statutory conditions have been met." Moore's Federal Practice §65.04[1] fn. 75. A copy of the section is annexed hereto as Appendix "A." See also United States v. Hayes Int'l Corp., 415 F.2d 1038, 1045 (5th Cir. 1969); Gresham v. Windrush Partners, 730 F.2d 1417, 1423 (11th Cir. 1984). The statutory conditions for an injunction under §401(b) were set forth in South Central Bell Telephone Company v. Louisiana Public Service Commission, 744 F.2d 1107 (5th Cir. 1984), vacated on other grounds 106 S.Ct. 2284 as follows:

"Under §401(b), a party seeking enforcement of an FCC declaration may obtain an injunction upon a finding that (1) the declaration is an FCC "order" within the meaning of the Act, (2) the order was regularly made and duly served upon the defendant, (3) the defendant is in disobedience of the order, and (4) the party seeking the injunction has been injured by the defendant's disobedience."

Thus, plaintiff herein, pursuant to 47 U.S.C. §401(b), having shown the order was regularly made and served (see plaintiff's memorandum of law, previously submitted), need show only that defendant is in disobedience of the order and that it has been injured by the defendant's disobedience. South Central Bell Tele-

phone Company v. Louisiana Public Service Commission, 744 F.2d 1107 (5th Cir. 1984), vacated on other grounds 106 S.Ct. 2284.

II.

COURTS HAVE ISSUED INJUNCTIONS UNDER §401(b) IN THE SAME CIRCUMSTANCES PRESENTED HEREIN

Two federal courts, the United States District Court for the Eastern District of Missouri, Eastern Division and the United States District Court for the Southern District of Texas, Houston Division have granted injunctions in precisely the circumstances presented herein. The Houston Court, in Houston Cellular Telephone Company v. John C. Nelson, et al., Civil Action H-95-617 (S.D. Texas 1994), granted a permanent injunction against two emulators, finding emulation of the ESN numbers is a violation of the ESN orders. The decision is annexed hereto as Appendix "C." (See also discussion in plaintiff's previous memorandum of law at 11-12). The Missouri Court, in Southwestern Bell Mobile Systems, Inc. v. Cell Phone Extensions, Inc. et al., No. 4:95 CV-795-CAS (E.D.Mo. 1995) initially granted a temporary restraining order against Cellular Phone Extensions, Inc. ("CPE"), an emulator, and subsequently a permanent injunction on May 24, 1995. A copy of

the District Court's Findings of Fact, Conclusions of Law and Final Order is annexed hereto as Appendix "B."

The Missouri District Court held as follows:

"Specifically, the Court concludes (i) the FCC's Order was regularly made and duly served upon CPE; (ii) the emulation of the ESNs of cellular telephones and the use of cellular telephones with altered ESNs violates the FCC's Report and Order No. 94-210 and FCC regulation 22-919 adopted pursuant to such Report and Order, and by emulating cellular telephone, CPE is knowingly disobeying such Order; (iii) unless CPE is enjoined, it will continue to violate such Order; and (iv) plaintiffs have been thereby injured."

This injunctive relief was granted to Southwestern Bell Mobile Systems, Cyber Tel Corporation, and Ameritech Mobile Communications.

Similarly, in Cellular Telephone Company, d/b/a Cellular One v. Cellular Two, Inc., et al., 95 Civ. 1666 (SJ), pending in the United States District Court for the Eastern District of New York, two defendant emulators consented to the entry of a permanent injunction barring them from emulating cellular telephones. See affidavit of Robert D. Kaplan offered in support of Cellular One's motion for preliminary injunction ¶3, annexed hereto as Appendix "D.")

III.

**DEFENDANT IS IN CLEAR DISOBEDIENCE
OF THE ESN ORDERS**

As detailed in plaintiff's main brief at pp. 5-7, the FCC orders at issue clearly prohibit individuals and companies from altering ESNs in cellular phones, as the District Court of Missouri clearly held on May 25, 1995 in Southwestern Bell Mobile Systems v. Cell Phone Extensions, Appendix "B" at p. 7. The FCC has specifically held that "any individual or company that knowingly alters cellular telephones to cause them to transmit an ESN other than the one originally installed by the manufacturer is aiding in the violation of our rules." Paragraph 62 of the Second ESN order, Exhibit "C" of the complaint.

There can be no doubt that defendant is knowingly altering cellular telephones and causing them to transmit an ESN other than the one originally installed. As set forth in the affidavits of John Talt and Garry Sutcliffe, at the request of Talt, for a fee, that is precisely what defendant did in order to provide Talt with a cellular telephone having the same telephone number as the NYNEX telephone Talt came in with.

As further set forth in the Sutcliffe affidavit, there is currently no way for a company or individual to provide multiple

cellular phones on the same telephone from the cellular telephone itself other than by causing the counterfeit phone to transmit the ESN of the registered phone. CES advertises that its very business is to provide multiple telephones with the same telephone number. (Exhibit "B" to the complaint.) Clearly, CES is knowingly altering cellular telephones in violation of the ESN orders.

The FCC has recently submitted a bill to the House Commerce Committee that would make it a crime to alter or tamper with ESNs of cellular telephones. A copy of the proposed bill is annexed hereto as Appendix B. In explaining the need for the bill the FCC stated:

"Industry losses in the magnitude of \$400,000,000 annually are the result of alteration of or tampering with electronic serial numbers of commercial mobile units."

Simply put, defendant's business is illegal. It operates by violating the ESN orders.

IV.

**NYNEX MOBILE HAS BEEN AND WILL
CONTINUE TO BE INJURED BY
DEFENDANT'S CONDUCT
SHOULD AN INJUNCTION NOT ISSUE**

NYNEX Mobile has suffered and will continue to suffer injury if an injunction is not granted. As set forth in the Sutcliffe affidavit, defendant's alteration of cellular telephones to cause them to transmit a different ESN than that which was factory installed facilitates fraudulent calls and unauthorized usage from counterfeit telephones which are not registered with NYNEX. In many instances, users of counterfeit telephones make local, long distance and overseas calls which are then billed to unsuspecting cellular customers whose telephones were counterfeited. This type of fraud causes millions of dollars of expenses and lost revenues to NYNEX Mobile. ESN emulation also enables cellular subscribers to operate more than one telephone using the same telephone number, thereby avoiding monthly per telephone service charges.

As further set forth in the Sutcliffe affidavit, defendant's alteration of cellular telephones also interferes with NYNEX Mobile's ability to counteract fraud. NYNEX Mobile has invested millions of dollars in fraud detection technologies and although

the technologies can occasionally detect when two telephones with the same ESN are using the system at the same time or using the system from very different locations within a very short time of each other, these technologies cannot determine which cellular phone is the authorized phone and which is the counterfeit. Furthermore, these technologies cannot determine whether the counterfeit phone is being used for purposes of toll fraud or by a subscriber as a second phone on the same telephone name.

The resulting injury to NYNEX Mobile and other cellular carriers is specifically recognized in the FCC's Report. The Commission concluded that the emulation of ESNs should be prohibited because, inter alia,

"simultaneous use of cellular telephones fraudulently emitting the same ESN . . . could cause problems in some cellular systems such as erroneous tracking or billing . . . [and] could deprive cellular carriers of monthly per telephone revenues to which they are entitled." (Paragraph 60 to the 2nd ESN order, Exhibit "C" to the complaint.)

NYNEX Mobile expends considerable resources to protect itself and its subscribers from fraud, including automatically shutting off service and contacting the subscriber whenever use of a counterfeit telephone is detected. Thus, regardless of whether the purported use of the counterfeit phone is fraud or a

second telephone for a subscriber, the counterfeit telephones impose considerable expenses on NYNEX Mobile.

In short, plaintiff is being deprived of activation fees, monthly access fees and air time charges to which they are entitled for the use of their cellular networks, and their costs of operation are increased and the good will of plaintiff with its customers is being adversely affected.

Pursuant to §401(b), NYNEX Mobile must make a showing of "injury" in order for the court to grant injunctive relief. The pecuniary losses suffered by NYNEX Mobile as a result of defendant's conduct as well as the interference with NYNEX Mobile's ability to counteract fraud clearly constitute sufficient harm to satisfy the injury requirement of §401(b). The District Court of Missouri so held three weeks ago. See Appendix "B."

V.

**NYNEX MOBILE IS ENTITLED TO A
PRELIMINARY INJUNCTION EVEN IF
TRADITIONAL EQUITABLE
PRINCIPLES ARE APPLIED**

Even if the Court were to require NYNEX Mobile to meet the traditional equitable test for a preliminary injunction, NYNEX Mobile would nevertheless be entitled to the relief it seeks. In the Second Circuit, the party seeking such relief must demonstrate "(1) irreparable harm should the injunction not be granted, and (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits and a balance of hardships tipping decidedly toward the party seeking injunctive relief.'" Able v. United States, 44 F.3d 128, 130 (2d Cir. 1995) (per curiam) (quoting Resolution Trust Corp. v. Elman, 949 F.2d 624, 626 (2d Cir. 1991)). NYNEX Mobile satisfies this standard.

First, NYNEX Mobile is suffering and will continue to suffer irreparable harm if the preliminary injunction is not granted. As an initial matter, NYNEX Mobile's loss of revenue up to the time of trial would be incalculable. See Gerard v. Almouli, 746 F.2d 936, 939 (2d Cir. 1984) (holding that plaintiff demonstrated likelihood of irreparable harm because "it would be impossible to produce an accurate money damages figure"); Ives Labs., Inc. v.